



Rooney, J. M. (2019). Standing and the Northern Ireland Human Rights Commission. *Modern Law Review*, 82(3), 525-548.
<https://doi.org/10.1111/1468-2230.12417>

Peer reviewed version

Link to published version (if available):
[10.1111/1468-2230.12417](https://doi.org/10.1111/1468-2230.12417)

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Wiley at <https://doi.org/10.1111/1468-2230.12417> . Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Standing and the Northern Ireland Human Rights Commission

Jane M Rooney*

*This is Bleak House we are in today – in the chancery courts waiting day after day after day after day for a decision that never comes.*¹

Abstract: On 7th June 2018, the UK Supreme Court held that the Northern Ireland Human Rights Commission (NIHRC) did not have standing under the Northern Ireland Act 1998 (NIA) and Human Rights Act 1998 (HRA) to challenge the legality of abortion law in Northern Ireland. This article argues that while a literal reading of the NIA exposes its inconsistencies, a purposive reading of both the NIA and HRA indicates that the NIHRC should have had standing. The article seeks to highlight the unique democratic function of the NIHRC in a consociational setting in protecting rights that are not represented along ethno-national lines. It also considers the negative ramifications that the judgment will have on women who have been victims of the legislative regime and seek to challenge the compatibility of Northern Irish abortion law with the HRA in the future.

Keywords: Abortion, victim, Human Rights Act 1998, Northern Ireland Act 1998, Consociational Constitutionalism, Devolution

Introduction

On 7th June 2018, the UK Supreme Court, by a majority of 4 versus 3 judges, held that the Northern Ireland Human Rights Commission (the NIHRC) did not have standing under the Northern Ireland Act 1998 (NIA) or Human Rights Act 1998 (HRA) to challenge the legality

* Bristol Law School, University of Bristol. The author would like to thank Sheelagh McGuinness, Claire Pierson, Alan Greene and Colin Murray for their helpful suggestions and comments. All URLs were last accessed 1st January 2019.

¹ M. Nesbitt, Ulster Unionist Party, Northern Ireland quotation taken from: ‘Bid to ease Northern Ireland abortion laws voted down’ (The Guardian, 11th February 2016) available at <https://www.theguardian.com/uk-news/2016/feb/11/northern-ireland-abortion-laws-easing-voted-down>.

of abortion law in Northern Ireland.² However, it was found *obiter dicta* that the law in Northern Ireland prohibiting abortion in cases of fatal foetal abnormality (FFA) and rape was incompatible with Article 8, right to private life, of the European Convention on Human Rights (ECHR).

The *obiter* declaration of incompatibility under section 4 HRA represents a victory for the NIHRC.³ However, because the case was officially lost on standing, the political pressure normally evoked by such a declaration was almost absent. The primary focus of this review article is to evaluate whether the NIHRC does and should have standing to bring human rights litigation in its own name under the NIA and HRA. It considers whether Lord Mance, delivering the majority opinion on standing, provided the correct interpretation of the NIA and HRA. Part 2 places the litigation in the context of legal and policy developments in abortion law in Northern Ireland and the Republic of Ireland over the last decade to highlight its significance. Part 3 argues that while a literal reading of the NIA exposes its inconsistencies, a purposive reading unequivocally indicates that the NIHRC was empowered to initiate proceedings in its own name, and both a literal and purposive reading of sections 3-5 HRA accommodate the NIHRC's standing. The implications of the judgment for reform of abortion law and the effect that denying the NIHRC standing will have on practical and effective review of law and policy for human rights compliance in Northern Ireland, are addressed in Part 4. The importance of the NIHRC's strategic litigation for ensuring that human rights issues are brought to the attention of those ultimately responsible, the UK central government, is also demonstrated.

Context and Judgment

A. Abortion Law in Northern Ireland

In England, Wales and Northern Ireland, abortion is recognised as a criminal offence under sections 58 and 59 of the Offences Against the Person Act 1861 (OAPA), and in common law

² *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27 (*Re NIHRC* (2018)).

³ F. Bloomer, K. McNeilly, and C. Pierson, 'The Supreme Court's decision on Northern Ireland's abortion law – what now?' (LSE's British Politics and Policy blog, 12th June 2018) at <http://blogs.lse.ac.uk/politicsandpolicy/supreme-court-on-ni-abortion-law/>.

in Scotland.⁴ According to the OAPA, a woman who intentionally procures an abortion, or any individual who aids in the commission of an abortion, will be guilty of a criminal offence,⁵ except when the mother's life is at risk.⁶ The Abortion Act 1967 carves out exceptions to the criminalisation of abortion in England, Scotland, and Wales. The 1967 Act allows for an abortion for up to 24 weeks gestation where two 'registered medical practitioners' agree 'in good faith' that an abortion should be provided under one of the grounds laid down in the Act.⁷

While the Abortion Act 1967 has been criticised for its denial of a woman's capacity to make responsible decisions regarding termination of pregnancy,⁸ those exceptions to the general criminal prohibition are not applicable in Northern Ireland.⁹ Women in Northern Ireland are subject to the full force of sections 58 and 59 prescribed under the OAPA, reiterated by section 25 Criminal Justice Act (Northern Ireland) 1945,¹⁰ except when an abortion is carried out in 'good faith' where continuation of a pregnancy 'creates a grave risk that the woman will become a mental or physical wreck'.¹¹ This is interpreted by the Northern Ireland High Court as allowing abortion 'where the continuance of the pregnancy threatens the life of the mother, or would adversely affect her mental or physical health'. 'Adversely affected' is interpreted as requiring the 'probability' or 'possibility' of 'real and serious [injury]...permanent or long term'.¹²

⁴ See e.g. J. Brown, 'Scotland and the Abortion Act 1967: historic flaws, contemporary problems' (2015) *Juridical Review* 2 citing *John Fenton* (1761), reported in *Burnett, A Treatise on various branches of the Criminal law of Scotland* (Edinburgh: Archibald Constable & Co, 1811) 6; *Patrick Robertson and Marion Kempt* (1627) *Hume I*, 186.

⁵ *Offences Against the Person Act 1861*, ss 58 and 59.

⁶ *R v Bourne* [1939] 1 KB 687.

⁷ *Abortion Act 1967*, s 1.

⁸ See e.g. E. Lee, S. Sheldon and J. Macvarish, 'The 1967 Abortion Act fifty years on: Abortion, medical authority and the law revisited' (2018) 212 *Social Science & Medicine* 26.

⁹ *Abortion Act 1967*, s 7(3).

¹⁰ Section 25 clarifies that the maximum sentence is penal servitude for life.

¹¹ *Northern Health and Social Services Board v A and Others* [1994] NIJB 1; *Western Health and Social Services Board v CMB* High Court (Family Division), 29 September 1995 (unreported).

¹² *The Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety and others* [2004] NICA 37 (*FPANI* (2003)). See further: Fiona Bloomer and Eileen Fegan, 'Critiquing recent abortion law and policy in Northern Ireland' (2013) 34(1) *Critical Social Policy* 109.

Only 13 terminations of pregnancy were carried out in Health and Social Care hospitals in Northern Ireland during 2016/17¹³ while at least 724 women from Northern Ireland travelled to England to have an abortion in 2016.¹⁴ The financial cost and/or fear of increased health risk as a result of travel has led to pregnant women resident in Northern Ireland increasingly relying on telemedical services, notably through Women on Web and Women Help Women, which are safe and legitimate providers of termination of pregnancy up to 9 weeks gestation.¹⁵ An average of 1130 women from Ireland and Northern Ireland sought home medical abortion pills from Women on Web in the period from 2010-15.¹⁶ As a result of access to the abortion pill through online services the first prosecutions in at least a decade for illegal abortions have taken place in Northern Ireland. In April 2016, a 19 year old woman was sentenced to imprisonment for 3 months suspended for two years for taking abortion pills sourced online.¹⁷ Another 21 year old was charged with supply and administration of harmful substances and given a bail of £500.¹⁸ A third case of charges against a woman, as well as a man assisting her, for using medical abortion pills, was dropped by the prosecution in the light of expert medical evidence of the risk to the woman's mental health, and potentially suicide.¹⁹

¹³ Department of Health, 'Northern Ireland Termination of Pregnancy Statistics' (Information Analysis Directorate, 24th January 2018) at <https://www.health-ni.gov.uk/sites/default/files/publications/health/hs-termination-of-pregnancy-stats-16-17.pdf>.

¹⁴ Department of Health and Social Care, 'Report on Abortion Statistics in England and Wales for 2016' 13 June 2017 at <https://www.gov.uk/government/statistics/report-on-abortion-statistics-in-england-and-wales-for-2016>.

¹⁵ See e.g. T. Hervey and S. Sheldon, 'Abortion by telemedicine in Northern Ireland: patient and professional rights across borders' (2017) 68(1) NILQ 1.

¹⁶ A.R.A. Aiken, R. Gomperts and J. Trussell, 'Experiences and characteristics of women seeking and completing at-home medical termination of pregnancy through online telemedicine in Ireland and Northern Ireland: A population-based analysis' (2016) International Journal of Obstetrics & Gynaecology 1208. The study did not distinguish between women living in Ireland and Northern Ireland. This was because many women from Ireland have a Northern Irish address to avoid confiscation by Irish customs.

¹⁷ H. McDonald, 'Northern Irish Woman Given Suspended Sentence over Self-induced Abortion' (*The Guardian*, 4th April 2016) at www.theguardian.com/uk-news/2016/apr/04/northern-irish-woman-suspended-sentence-selfinduced-abortion.

¹⁸ 'Irish woman accused of using poison to procure abortion' (*The Irish Times*, 11th January 2016) at <https://www.irishtimes.com/news/crime-and-law/irish-woman-accused-of-using-poison-to-procure-abortion-1.2492666%3fmode=amp>.

¹⁹ 'Man and woman cautioned over abortion pills' (BBC News, 18th January 2017) at <https://www.bbc.co.uk/news/amp/world-europe-38669974>.

B. Legal Developments and the Present Litigation

The significance of the present legal proceedings can be seen in the context of legal developments and decisions taken in the Republic of Ireland, Northern Ireland, and in international law.²⁰ Northern Ireland abortion law progressively developed an anomalous character in comparison to the rest of the UK, Ireland, and international standards, and also changing attitudes within Northern Ireland itself.

In 2011, the European Court of Human Rights (ECtHR) decided in *A, B and C v Ireland* that a wide margin of appreciation would be accorded to the Republic of Ireland to decide its own abortion law but that a breach of article 8 arose as a result of the lack of clear legal framework to ensure that the existing domestic legal exceptions to the blanket prohibition on abortion were practical and effective.²¹ The lack of clarity in the legal framework created a chilling effect which meant that in practice abortions were not carried out because of fear of criminal sanction under the OAPA. It was not until the death of Savita Halappanavar in October 2012, who died of septicaemia as a result of being refused medical termination, that steps were taken to comply with the judgment.²² The Protection of Life During Pregnancy Act 2013, which established procedures for ensuring that a woman's life was in fact at physical and mental risk before a termination of pregnancy was permitted, was criticised for the demeaning procedures it prescribed.²³

In 2013, in its effort to implement a 2004 decision of the Northern Ireland Court of Appeal which found that the Department of Health and Social Services and Public Safety (DHSSPS)

²⁰ The context provided omits the sustained grass-roots initiatives across the Republic of Ireland and UK which facilitated these legal and policy milestones. For a more comprehensive appraisal of how these landmarks did not arise in a political vacuum in Northern Ireland, see e.g. C. O'Rourke, 'Advocating Abortion Rights in Northern Ireland: Local and Global Tensions' (2016) 25(6) *Social and Legal Studies* 716; F. Bloomer, 'Protests, Parades and Marches: activism and extending abortion legislation to Northern Ireland' in L. Fitzpatrick (ed), *Performing Feminisms in Contemporary Ireland* (Dublin, Ireland: Carysfort Press, 2013).

²¹ *A, B and C v Ireland* (2011) 53 EHRR 13. The ECtHR followed the approach adopted in *Tysiac v Poland* (2007) 45 EHRR 42.

²² H. McDonald, 'Savita Halappanavar death: nine members of medical team disciplined' (11th September 2014) at <https://www.theguardian.com/world/2014/sep/11/savita-halappavanar-abortion-ireland-medical-team-disciplined>.

²³ See e.g. C. Murray, 'The Protection of Life During Pregnancy Act 2013: Suicide, Dignity and the Irish Discourse on Abortion' (2016) 25(6) *Social and Legal Studies* 667.

failed to provide services for lawful termination of pregnancies in conformity with existing abortion laws,²⁴ the DHSSPS published draft guidelines on abortion law in Northern Ireland.²⁵ However, rather than implementing the decision, it merely clarified that women could travel to England to access an abortion. In 2015, Sinn Féin, the Irish Nationalist Party in Northern Ireland, signalled support for liberalising abortion in cases of FFA.²⁶ Later that year, in the Northern Ireland High Court, Judge Horner found for the first time that prohibiting abortion in cases of FFA and sexual crimes constituted a violation of the article 8 right to private life.²⁷

In 2016, the UN Human Rights Committee found that the Republic of Ireland was in breach of the right against cruel, inhumane and degrading treatment under article 7 of the International Covenant on Civil and Political Rights for failing to provide access to abortion in FFA cases.²⁸ That year, the first prosecutions for illegal terminations of pregnancies in over a decade began in Northern Ireland. On 14th June 2017, Leo Varadkar, the Irish Taoiseach, announced there would be a referendum in the Republic of Ireland to repeal the 8th Amendment of Article 40.3.3 of the Constitution of Ireland, which had placed the right to life of the foetus on a constitutional footing and prevented legislative change on abortion laws.²⁹ On the same day, the UK Supreme Court found the Secretary of State for Health was under no legal obligation to make provision for free terminations for Northern Irish women travelling to England for an abortion. It found there had been no violation of human rights on the grounds of discrimination vis-à-vis women from Northern Ireland and women from the rest of the UK.³⁰ In response to the judgment, Labour MP Stella Creasy called for a vote to amend the Queen's Speech to let Northern Irish

²⁴ *Family Planning Association of Northern Ireland v Minister of Health, Social Services and Public Safety* [2004] NICA 39.

²⁵ Department of Health, Social Services and Public Safety, 'Draft Termination of Pregnancy Guidance Summary of Consultation Responses Received' (Family Policy Unit, Belfast, October 2013) at <https://www.health-ni.gov.uk/consultations/guidance-termination-pregnancy-northern-ireland>.

²⁶ H. McDonald, 'Sinn Féin drops opposition to abortion at Derry congress' (*The Guardian*, 7th March 2015) at <https://www.theguardian.com/politics/2015/mar/07/sinn-fein-drops-opposition-to-abortion-at-derry-congress>.

²⁷ *The Northern Ireland Human Rights Commission's Application* [2015] NIQB 96 (*Re NIHRC* (2015)). See further, M. Fox and S. McGuinness, 'In the Matter of an Application for Judicial Review by the Northern Ireland Human Rights Commission [2015]' in R. Auchmuty and E. Rackely (eds), *Women's Legal Landmarks* (Hart 2018) 619.

²⁸ *Mellet v Ireland* UN Human Rights Committee, 17th November 2016, CCPR/C/116/D/2324/2013.

²⁹ Article 40.3.3 of the Constitution of Ireland, 29th December 1937 as amended by Eighth Amendment of the Constitution Act 1983; Offences Against the Person Act 1861, ss58 and 59.

³⁰ *R (on the application of A and B) v Secretary of State for Health* [2017] UKSC 41.

women access abortions on the NHS. Rather than putting it to the vote, the Conservative government acquiesced and on 29th June 2017, the Government Equalities Office confirmed that it would cover the cost.³¹ A further development which took place on the same day, was that the Northern Ireland Court of Appeal reversed Judge Horner's decision, finding there was no breach of article 8 in cases of FFA and sexual crime.³²

In July 2017, the Committee on the Elimination of Discrimination Against Women found that the UK was in violation of the Convention on the Elimination of Discrimination Against Women (CEDAW) for abortion laws in Northern Ireland failing to address the legal framework governing abortion in Northern Ireland. The UK was found in violation for:

...[p]erpetuating acts of gender-based violence against women through its deliberate maintenance of criminal laws disproportionately affecting women and girls, subjecting them to severe physical and mental anguish that may amount to cruel, inhuman and degrading treatment.³³

In February 2018, the UK government rejected the CEDAW Committee's findings, stating that it was ultimately the Northern Irish Assembly's responsibility to reform their own laws.³⁴ On the 25th May, the Republic of Ireland voted to repeal the 8th Amendment of the Irish Constitution.³⁵ From January 2019, the Health (Regulation of Termination of Pregnancy) Act 2018 enables for abortion to be accessible in ROI where there is 'a risk to the life, or of serious harm to the health, of the pregnant woman' and where 'the foetus has not reached viability'.³⁶ ~~While a legislative framework is being consolidated in ROI, proposals ensure for the provision~~

³¹ The Rt Hon Justine Greening MP, 'A letter from Justine Greening sent to MPs concerning the situation of women from Northern Ireland travelling to England for an abortion' (Government Equalities Office, 29 June 2017) available at <<https://www.gov.uk/government/news/access-to-abortion-services-in-england>> last accessed 25th July 2018.

³² *The Northern Ireland Human Rights Commission's Application* [2017] NICA 42 (*Re NIHRC* (2017)).

³³ *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* 19th July 2017, CEDAW/C/OP.8/GBR/1 at [72].

³⁴ *Observations of the Government of the UK* 23rd February 2018 CEDAW/C/OP.8/GBR/2 at [14]-[15].

³⁵ n 29 above.

³⁶ Health (Regulation of Termination of Pregnancy) Act 2018, s 11.

~~of abortion at least in cases of FFA, sexual crimes, and serious risk or emergency to the health of the woman.³⁷~~

The ROI referendum threw into stark light the anomalous position of Northern Ireland as compared with both the UK and ROI. Sinn Féin, which has a cross-border presence in both Northern Ireland and the Republic of Ireland, expressed its support for ensuring reform, even while the Northern Ireland Assembly was suspended, advocating a British and Irish Intergovernmental Conference.³⁸ The Ulster Unionist Party (UUP) expressed its support for liberalization of abortion while the Democratic Unionist Party (DUP), currently in a confidence and supply arrangement with the Conservative party, did not wish for reform.³⁹ The Social and Democratic Labour Party (SDLP), a major nationalist Northern Irish party with a cross-border presence, initially reaffirmed its pro-life stance after the referendum, but the party has become increasingly divided.⁴⁰ In light of the referendum, Stella Creasy, Labour MP, successfully called an emergency debate in Westminster on 5th June 2018 to include in the Domestic Violence and Abuse Bill an amendment to the sections of the OAPA that criminalize abortion across the UK, with intense cross-party support.⁴¹

The *obiter dicta* declaration of incompatibility under section 4 of the Human Rights Act 1998 in the UK Supreme Court decision on 7th June 2018 built upon this momentum. The judgments of the Supreme Court were printed in order of seniority, reverting to the practice of the appellate committee of House of Lords, reflecting the contentiousness and politically complex and

~~³⁷ General Scheme of a Bill Entitled Health (Regulation of Termination of Pregnancy) Bill 2018 available at <<https://health.gov.ie/wp-content/uploads/2018/07/Updated-General-Scheme-of-the-Health-Regulation-of-Termination-of-Pregnancy-Bill-2018.pdf>> last accessed 25th July 2018.~~

³⁸ 'Michelle O'Neill welcomes Westminster's 'first step' towards abortion reform in the North' (*Irish Examiner*, 5th June 2018) at <https://www.irishexaminer.com/breakingnews/ireland/michelle-oneill-welcomes-westminsters-first-step-towards-abortion-reform-in-the-north-847063.html>.

³⁹ P. Waugh, 'Theresa May Says 'No' To Northern Ireland Abortion Reform' available at https://www.huffingtonpost.co.uk/entry/may-refuses-northern-ireland-abortion-reform-as-dup-warns-she-needs-them-to-deliver-brexit_uk_5b0d48d9e4b0fdb2aa56d72a.

⁴⁰ S. Breen, 'Abortion: Opinions split among key SDLP as calls made for debate on law reform' (*The Belfast Telegraph*, 30th May 2018) at <https://www.belfasttelegraph.co.uk/news/northern-ireland/abortion-opinions-split-among-key-sdip-as-calls-made-for-debate-on-law-reform-36960123.html>.

⁴¹ H. Stewart, 'MPs call on May to decriminalise abortion in Northern Ireland' (*The Guardian*, 3rd June 2018) at <https://www.theguardian.com/uk-news/2018/jun/03/mps-call-on-may-to-decriminalise-abortion-in-northern-ireland>.

sensitive nature of the issue. Lords Mance, Kerr, Wilson, and Lady Hale decided that Northern Irish law was incompatible with Article 8 right to private life in cases of rape, incest, and FFA, while Lady Black found incompatibility in relation to FFA only. Lords Reed and Lloyd-Jones found no incompatibility with articles 8 or 3, right against torture and inhumane and degrading treatment, while Lords Kerr and Wilson found incompatibility in relation to both articles.

The declaration of incompatibility of Northern Irish abortion law with the ECHR was important. However, the fact that the case was lost on refusal to grant the NIHRC standing was most pertinent to the fact that the decision was met with limited political response.⁴² A declaration of incompatibility, although not legally binding, would have placed significant political pressure on the government to facilitate legislative reform.⁴³ The likelihood of the litigation taking place in the absence of the NIHRC's standing is slim and the precedent may have negative repercussions for the protection of human rights in Northern Ireland in the future.

The Northern Ireland Human Rights Commission's Standing

A. Introduction

Lords Mance (Lord Reed, Lloyd-Jones and Lady Black concurring) found the NIHRC had no standing,⁴⁴ while Lord Kerr (Lord Wilson concurring), as well as Lady Hale, dissented on this point.⁴⁵ The relative significance ascribed to the HRA and NIA varied across judgments. The HRA was used as an analogy to the NIA, unpicking the literal meaning of the NIA by reference to the HRA;⁴⁶ the NIA was interpreted as definitive on the question of standing regardless of what the HRA provided;⁴⁷ and the HRA was seen as an alternative source of authority for the NIHRC's standing in the event that there was, or was not, any such provision under the NIA.⁴⁸

⁴² M. Connolly, 'Supreme Court rejects NI abortion law case' (*BBC News*, 7th June 2018) at <https://www.bbc.co.uk/news/uk-northern-ireland-44395150>.

⁴³ See e.g. Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2011-12*, September 2012 at <http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rightsjudgments.pdf>.

⁴⁴ *Re NIHRC* (2018) n 2 at [48 - 73].

⁴⁵ *Ibid* at [11 - 18]; [168 - 213].

⁴⁶ *Ibid* at [54], [59-60].

⁴⁷ *Ibid* at [211].

⁴⁸ *Ibid* at [17], [203].

Clarification of their relationship is required in relation to standing. While certain provisions of the NIA expressly depend on the meaning given to terms of the HRA, this is not the case for all of the former legislation's provisions. The two statutes should be read separately in order to provide a comprehensive and fair reading of each statute, to avoid incoherency and manipulation of the text. It needs to be considered in turn whether the NIA, and then the HRA, empowers the NIHRC to bring proceedings, or whether one of the statutes provides a definitive barrier to standing.

B. Northern Ireland Act 1998

Sections 68-71 NIA specifies the NIHRC's functions and powers. Section 68 provides for its creation and Section 69 lists its functions. Sections 69(1)-(4) detail how the NIHRC is empowered to review and advise on human rights compatibility of legislation. Section 69(5) NIA states that the NIHRC can 'give assistance to individuals in accordance with section 70' (section 69(5)(a)) and 'bring proceedings involving law or practice relating to the protection of human rights' (section 69(5)(b)). Section 70 is entitled 'Assistance by Commission' and applies to 'proceedings involving law or practice relating to the protection of human rights which a person' has commenced or wishes to commence (section 70(1)(a)) or 'proceedings in the course of which such a person relies, or wishes to rely, on such law or practice' (section 70(1)(b)). The NIHRC can provide assistance in the form of providing or arranging 'legal advice' (Section 70(3)(a)), arrange for 'legal representation' (Section 70(3)(b)) or 'provide any other assistance which it thinks appropriate'.

Section 71(1) makes it clear that a 'person' cannot challenge the compatibility of legislation or an act with the ECHR unless they are a victim as defined by Article 34 ECHR.⁴⁹ Section 71 (2A) states that 'Subsection (1) does not apply to the Commission'. In 'instituting, or intervening in, human rights proceedings', the NIHRC does not need to be a victim of an unlawful act;⁵⁰ and does not need to meet the requirements of a victim set out under section 7

⁴⁹ Northern Ireland Act 1998, s 71(1): Nothing in section 6(2)(c) or 24(1)(a) shall enable a person—

(a) to bring any proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the Convention rights; or

(b) to rely on any of the Convention rights in any such proceedings,

unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights.

⁵⁰ Northern Ireland Act 1998, s 71(2B)(a).

HRA,⁵¹ but can only act ‘if there is or would be one or more victims of the unlawful act’.⁵² Section 71(2C) provides that for the purposes of subsection (2B) ‘human rights proceedings’ means proceedings which rely (wholly or partly) on section 7(1)(b) HRA or section 69(5)(b) NIA.⁵³ An expression used in subsection (2B) and in section 7 HRA have the same meaning.⁵⁴

Lord Mance states that it is outside the NIHRC’s competence to institute abstract proceedings or an *actio popularis*,⁵⁵ ‘actions in the public interest based on abstract arguments that legislation or government practice generally tend to violate particular rights’.⁵⁶ Lord Mance asserts that proceedings relying wholly or partly on section 69(5)(b) constitute, under section 71(2C) (a)(ii), ‘human rights proceedings’ and are subject therefore to the restrictions in section 71(2B).⁵⁷ Section 71(2B) states that ‘human rights proceedings’ only relate to an unlawful public authority action where there is an identifiable victim. Lord Mance notes this is consistent with the procedure set out in sections 6-9 of the HRA enabling a specific victim to challenge a specific unlawful act by a public authority. This is in contrast to sections 3-5 HRA ~~proceeding~~ which enable a challenge to legislation. Lord Mance states this is evidence that the NIHRC had to identify and represent a specific victim of a specific unlawful act in order to have standing under section 71(2B).

Section 71(2C)(b) provides that an expression used in section 71(2B) NIA and section 7 HRA has the same meaning in the former as in latter. Section 7 refers to section 6 for the definition of an ‘unlawful act’. Section 6(1) does not apply to an authority’s act that was compelled by primary legislation. Section 6(6) means that an act does not include a failure to introduce, or lay before Parliament, a proposal for legislation. Section 71(2)(a)(ii) provides that the definition of ‘human rights proceedings’ applies to section 69(5)(b). Lord Mance additionally states that sections 71(3) and (4) make express that section 71(1) requires a person to follow the procedure outlined under sections 6 and 7 HRA. Therefore, Lord Mance concludes, the NIA only gives the NIHRC a power to bring proceedings on behalf of an identifiable victim

⁵¹ Northern Ireland Act 1998, s 71(2B)(b).

⁵² Northern Ireland Act 1998, s 71(2B)(c).

⁵³ Northern Ireland Act 1998, s 71(2C)(a).

⁵⁴ Northern Ireland Act 1998, s 71(2C)(b).

⁵⁵ *Re NIHRC* (2018) n 2 above at [42].

⁵⁶ J. Miles, ‘Standing under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication’ (2000) 59(1) CLJ 133, 138.

⁵⁷ *Re NIHRC* (2018) n 2 above at [54].

for a specific unlawful act committed by a public authority, even regarding the powers relating to section 69(5)(b), and failure to change incompatible legislation cannot be construed as an unlawful act under section 71(2B) and (2C) because it is expressly prohibited under section 6 and the former provisions must be read in light of the latter.⁵⁸

In contrast, Lady Hale and Lord Kerr interpret section 69(5)(b) as empowering the NIHRC to initiate its own proceedings to challenge the compatibility of legislation with human rights.⁵⁹ They both link section 69(5)(b) with the procedure set out in sections 3-5 HRA for challenging legislation, rather than an act of a public authority, stating that the former does not require a victim or an unlawful act, but can be an abstract application challenging the compatibility of legislation.⁶⁰ For Lady Hale, sections 71(2B) and (2C) are consistent with sections 6-9 HRA procedure on unlawful public authority acts and requires an identifiable victim⁶¹ but section 69(5)(b) and section 70 indicate that the NIHRC has the power to challenge legislation in its own name, without an identifiable victim or specific unlawful act.⁶² She cites Section 70(1) as applying to proceedings not only where a person has commenced or wants to commence proceedings and needs the NIHRC's assistance (section 70(1)(a)) but also 'proceedings in the course of which such a person relies, or wishes to rely, on such law or practice' (section 70(1)(b)),⁶³ interpreting the latter to mean a challenge to legislation in the abstract rather than on behalf of a victim. Lord Kerr interprets section 71(2B) as including the procedure for challenging human rights compatibility of legislation, reading 'unlawful act' in that section as including the inaction of Ministers in not amending incompatible legislation.⁶⁴ Lord Kerr states that section 71(2B)(c) does not require the NIHRC to represent a specific victim: 'there is or *would be* one or more victims of the unlawful act' is evidence of the fact that the NIHRC can bring cases challenging legislation, and pre-emptively protect victims.⁶⁵

Lord Mance's reading of the NIA depends upon Section 71(2)(a)(ii), which makes clear that the narrow interpretation of 'human rights proceedings' applies to section 69(5)(b), restricting the NIHRC's competence to merely represent individuals who are victims of unlawful acts, rather than enabling it to challenge legislation for its human rights incompatibility under the

⁵⁸ Ibid at [59- 60].

⁵⁹ Ibid at [17].

⁶⁰ Ibid at [13], [184].

⁶¹ Ibid at [18].

⁶² Ibid at [16-17].

⁶³ Ibid at [12].

⁶⁴ Ibid at [180].

⁶⁵ Ibid at [180], [195]. Emphasis added.

HRA. However, there are provisions which are expressly inconsistent with this reading. Section 69(5)(a) provides the NIHRC with the power to ‘represent’ an individual in legal proceedings and section 69(5)(b) states that the NIHRC can ‘bring proceedings’. By providing that section 69(5)(b) only applies in cases where the NIHRC is bringing a case on behalf of an identified victim of a specific unlawful act by a public authority, Lord Mance interprets section 69(5)(a) and 69(5)(b) as conferring the NIHRC with the same power rather than two distinct powers. Section 70, which specifies ‘assistance’ provided by the NIHRC, expressly helps elucidate section 69(5)(a) but not section 69(5)(b). The High Court, Court of Appeal, the only Northern Irish judge sitting on the Supreme Court, and the President of the Supreme Court recognise two distinct powers. Section 71(2)(a)(ii) has the effect of circumscribing section 69(5)(b) to mean the exact same as section 69(5)(a), despite the fact that they expressly purport to confer different powers. Section 69(5)(b) empowers the NIHRC to ‘bring proceedings’ rather than merely assist or represent a specific victim of human rights violations.

Lady Hale and Lord Kerr support the broader reading of section 69(5)(b). Lady Hale does not try to explain why section 71(2)(a)(ii) should be read as in fact *not* indicating that section 69(5)(b) is restricted to the section 6-9 HRA procedure. Further, the wording of section 70(1) is completely opaque and could have the meaning she ascribes to it – or not. Lord Kerr’s assertion that sections 71(2B) and (2C) include failure to change incompatible legislation as an ‘unlawful act’, thus granting NIHRC standing, cannot be correct because a literal reading of those provisions indicates ‘unlawful act’ cannot include legislative (un)change.⁶⁶

Lord Mance asserts that the issue is one of ‘statutory construction, not a priori preconception’.⁶⁷ However, the fact that his reasoning is driven by his own preconceptions of the NIHRC’s powers is evidenced by assertions of what he considers as a ‘natural’ or ‘plausible’ interpretation⁶⁸ of the legislation. Crucially, there is inconsistency and ambiguity in the legislative scheme setting out the standing of the NIHRC under sections 68-72. A literal interpretation provides that the NIHRC both does and does not have standing. A purposive interpretation must be adopted in order to avoid the inconsistency that arises from a literal interpretation.⁶⁹ An interpretation of section 69(5)(b) in the context of sections 68-72 powers

⁶⁶ Ibid at [59-60].

⁶⁷ Ibid at [61].

⁶⁸ Ibid at [61], [69].

⁶⁹ Ibid at [203] citing *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8]. See also, *Re NIHRC* (2017) n 31 above at [37].

points to the NIHRC being able to initiate proceedings in its own name challenging the compatibility of the legislation with human rights. It does not point to the NIHRC's main function in legal proceedings as representing a victim of human rights violations.

The Belfast Agreement, otherwise known as the Good Friday Agreement (GFA) and NIA emphasise the core function of the NIHRC to advise and monitor law and policy for human rights compatibility and make recommendations to the Executive. Paragraph 5 of Strand 3 of the GFA outlines the NIHRC's main functions as:

keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; ...considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals to do so.

Section 69 places these functions on a legislative footing. The NIHRC must 'keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights';⁷⁰ make recommendations to the Secretary of State on the adequacy and effectiveness of law and policy;⁷¹ advise the Secretary of State and the Executive Committee of the Assembly on legislative measures that should be taken;⁷² and review Bills for their compatibility with human rights.⁷³ While all of those subsections begin 'the Commission shall', section 69(5), enabling the NIHRC to bring legal proceedings, begins 'the Commission may'. Legal proceedings are a measure of last resort as was the case in the present litigation.

Judge Horner, in the High Court decision, sets out the dialogue between the NIHRC and the executive which took place before the instigation of legal proceedings.⁷⁴ In April 2013 the DHSSPS published draft guidelines on abortion law in Northern Ireland which were more than eight years in the making.⁷⁵ The guidelines stipulated that it was not a crime to assist women to travel to another jurisdiction for a termination. The NIHRC wrote to the Minister of Justice and the DHSSPS Minister detailing the illegality of the law on termination of pregnancy in Northern Ireland as contrary to human rights obligations in relation to rape, incest and serious

⁷⁰ Northern Ireland Act 1998, s 69(1).

⁷¹ Northern Ireland Act 1998, s 69(2).

⁷² Northern Ireland Act 1998, s 69(3).

⁷³ Northern Ireland Act 1998, s 69(4).

⁷⁴ *Re NIHRC* (2015) n 26 above at [9-17].

⁷⁵ n 24 above.

malformation of the foetus. After discussion with the NIHRC, the Minister of Justice announced an intention to lay a consultation document before the Justice Committee by March 2014. In January, April, June, July, and August 2014, the NIHRC wrote to the Ministry of Justice when no consultation document was produced and again highlighted in detail the human rights incompatibility of the current regime which were each followed by responses from the Ministry promising the document imminently. The Consultation Document was issued in October 2014. It did not address abortion for serious malformation of the foetus, or make recommendations to permit abortion in cases of rape or incest. In November 2014, the NIHRC sent a pre-action protocol letter to the Department of Justice making it clear that unless the Department put forward legislation to allow for lawful termination of pregnancy in these cases, it would initiate legal proceedings.

Legal proceedings were a measure of last resort and an exceptional means through which the NIHRC could exercise its function in ensuring human rights compatible law and policy. Advising on legislative proposals and policy is its main function. By confining the NIHRC's standing to representing an individual victim in an individual case, characterising the NIHRC as primarily a litigator and legal advocate, Lord Mance overlooked its primary function which is to engage and work with government to ensure law and policy is human rights compatible. Ensuring that the NIHRC has standing to challenge legislation is much more within its purview from this perspective than empowering the NIHRC to represent claimants. Lord Kerr points out that:

it would be anomalous if the NIHRC did not have the power to challenge the compatibility of legislation with the provisions of the ECHR, given its principal stated function... The power to challenge incompatible legislation is a natural complement to the duty to advise the SOS and the Executive Committee of the NI Assembly about legislative and other measures necessary to protect human rights.⁷⁶

While a literal interpretation of the NIA reveals inconsistency in the drafting of the legislation, a purposive approach unambiguously points to the NIHRC being able to bring proceedings in its own name to challenge legislation.

⁷⁶ *Re NIHRC* (2018) n 2 above at [18], [171-172].

C. Human Rights Act 1998

Under the NIA, the NIHRC does not have to be a victim in order to bring ‘human rights proceedings’⁷⁷ and can bring abstract challenges against legislation without representing a victim. This section considers whether the HRA nevertheless bars the NIHRC from bringing proceedings in its own name, or in the event that the literal and purposive reading of the NIA set out here is unpersuasive, whether the HRA provides separate legal authorisation for the NIHRC’s standing.

Lord Mance provides that there is nothing in the NIA that suggests that the NIHRC can challenge legislation. When the NIHRC challenges an unlawful act there must be an identifiable victim and a specific unlawful act in conformity with sections 6-9 HRA through which sections 71(2B) and (2C) are construed.⁷⁸ For Lord Mance, the HRA does not provide an alternative means through which the NIHRC can pursue its claims for standing. Lord Mance accepts that sections 3 and 4 are not subject to the victimhood requirement.⁷⁹ Nevertheless, sections 3-5 claims cannot be brought in isolation or in the abstract but rather are parasitic on sections 6-9 proceedings or used in horizontal, adversarial proceedings: ‘Sections 3 and 4 are resorted to as a last resort by a person pursuing a claim or defence under sections 7 and 8’.⁸⁰ The NIHRC must represent an individual who is ‘personally adversely affected’ by the alleged violations to have standing.⁸¹ At the very least, an actor wishing to bring proceedings under sections 3 and 4 must be subject to the usual rules of standing of public law proceedings.⁸²

Lord Mance provides no authority for the assertion that section 3 and 4 claimants need to meet the requirements of standing for public law proceedings. But if those rules were to be applied the NIHRC would meet those standards. The test for standing for judicial review of administrative acts is that the applicant must have a ‘sufficient interest’.⁸³ In order for an organization to have a sufficient interest it must not be a ‘meddlesome busybody’ but have a

⁷⁷ Northern Ireland Act 1998, s 71(2A).

⁷⁸ *Re NIHRC* (2018) n 2 above at [56].

⁷⁹ *Ibid* at [62] citing *R(Rusbridger) v AG* [2004] 1 AC 357 at [21].

⁸⁰ *Ibid* at [62] citing *Lancashire County Council v Taylor* [2005] EWCA Civ 284; [2005] 1 WLR 2668 at [28].

⁸¹ *Ibid* at [62].

⁸² *Ibid* at [62].

⁸³ Senior Courts Act 1981, s 31(1).

‘genuine interest’⁸⁴ in the issue at hand. In *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd*,⁸⁵ World Development Movement Ltd sought judicial review of Secretary of State for Foreign and Commonwealth Affairs decisions to fund the Pergau Dam in Malaysia as *ultra vires*.⁸⁶ ‘Vindicating the rule of law’, ‘the importance of the issue raised’, ‘the likely absence of any other responsible challenger’, and ‘the prominent role of these applicants in giving advice, guidance and assistance’, were factors considered in determining whether World Development Movement had standing.⁸⁷

In the present litigation there is, if not an express, an implied provision that it is the role of the NIHRC to bring this litigation. The NIHRC was best placed to represent the victims because of the resources at its disposal, the expertise it could draw on, its role as a quasi-governmental body that engages with the Executive and Legislature to ensure that legislation is human rights compliant, its desire for a declaration of incompatibility, and to lessen the burden of the victims.⁸⁸ Again, Lord Mance does not provide authority for the requirement of meeting standing rules under public law proceedings for the purposes of section 4 HRA so this is a purely academic point.

Lord Kerr and Lady Hale reject the argument that the NIHRC must represent a specific victim of a specific unlawful act before it may bring proceedings to challenge the compatibility of legislation with the ECHR.⁸⁹ A challenge to a decision of a public authority may prompt a declaration of incompatibility in relation to the legislation but that does not preclude a freestanding challenge to legislation under sections 3-5. A sections 3-5 challenge does not necessarily require the identification of a victim of an unlawful public authority act as required under sections 6-9 procedure.⁹⁰ A free standing challenge to legislation can be brought for the

⁸⁴ *R v HM Inspectorate of Pollution, ex parte Greenpeace (No 2)* [1994] 4 All ER 32976, 83 citing *R v Monopolies and Mergers Commission ex parte Argyle Group* [1986] 2 All ER 257.

⁸⁵ *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386.

⁸⁶ *Ibid* at [389-390].

⁸⁷ *Ibid* at [395] relying extensively on *Ex p Child Poverty Action Group* [1990] 2 Q.B.

⁸⁸ Explained further below.

⁸⁹ *Re NIHRC* (2018) n 2 above at [183].

⁹⁰ *Ibid* at [185].

sections 3-5 procedure.⁹¹ There is nothing in the wording of section 4 that warrants the view that a sections 3-5 challenge is parasitic on the sections 6-9 procedure.⁹² *Ghaidan v Godin Mendoza*, *Wilson v First County Trust (No 2)* and *Steinfeld v SOS for Education*⁹³ which although horizontal proceedings, are cases brought by individuals ‘directly affected’ by the legislation which is being challenged. *R (Rusbridger) v Attorney General*⁹⁴ was also cited and can be distinguished from the other cases insofar as the journalists who sought to challenge legislation criminalising publication of articles advocating abolition of the monarchy had not been ‘directly affected’ by that legislation at any point. But they could potentially have been directly affected and wanted an assurance that they would not be prosecuted. The litigation was ultimately dismissed for serving no practical purpose but there was no question of the standing of the journalists who wanted to know, as an academic question, whether out of date legislation would be enforced. If there is no barrier to this kind of case, then it is difficult to see why the NIHRC, as it is vested with the responsibility to challenge potentially incompatible legislation and to ensure executive and legislative measures are taken to remedy incompatibility, would be barred from contesting the legality of Northern Irish abortion legislation.

The purpose of sections 3-5 HRA is to ensure that legislation is compliant with human rights. Both sections 3 and 4 are designed to facilitate systematic change of Acts of Parliament for human rights compliance, not to police individual public authority unlawful actions. While sections 3-5 HRA cases are predominantly brought by those directly affected, acknowledging the NIHRC’s standing would be more in-keeping with the function of sections 3-5 HRA: calling out legislation that systematically violates human rights, rather than representing individuals in relation to individual instances.

There are two predominant reasons why the HRA should accommodate standing of the NIHRC. First, the NIHRC should have standing because to deny it would give rise to another anomaly: the National Human Rights Institution (NHRI) of England, Wales and Scotland

⁹¹Ibid at [203]; *Re NIHRC* (2017) n 31 above at [37-39]. Both cite *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687. *Re NIHRC* (2018) n 2 above at [17] citing *Wilson v First County Trust (No 2)* [2004] 1 AC 816; *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

⁹² *Re NIHRC* (2018) n 2 above at [184].

⁹³ *Steinfeld v SOS for Education* [2017] 3 WLR 1237.

⁹⁴ *Re NIHRC* (2018) n 2 above at [186], [188]. Both cite *R (Rusbridger) v Attorney General* [2004] 1 AC 357.

would have standing under the HRA but not the NHRI of Northern Ireland. Second, the NIA is a constitutional statute through which the HRA's rules on standing should be interpreted.

Lady Hale and Lord Kerr agreed that the NIHRC should be treated the same as the Equality and Human Rights Commission (EHRC).⁹⁵ The EHRC submitted that its constitutive statutory instrument, the Equality Act 2006 (EA), vests it with the power to institute proceedings which challenge the compatibility of legislation with the ECHR.⁹⁶ Section 30 (1) EA states that the EHRC has the 'capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function'. Denying the NIHRC standing 'introduces a perplexing and unaccountable discrepancy between the powers available' to each NHRI.⁹⁷

Lord Mance denied that the wording of the EA inevitably enabled the EHRC to institute proceedings for judicial review.⁹⁸ Besides, the EHRC and NIHRC statutory schemes were different: 'enacted at different times in different terms and without reference to each other'.⁹⁹ Lord Mance fails to acknowledge that they are both NHRIs. Both are 'A' status-accredited NHRIs by the International Coordinating Committee on NHRIs (ICC) under the Paris Principles which establish the minimum standards required for the independent and effective functioning of NHRIs. Their relationship with government is *sui generis* as compared with other arms-length bodies or NGOs, maintaining an appropriate balance between advising government on policy and legislation for human rights and ensuring independent scrutiny. Both Commissions are confident of the fact that they have powers to initiate proceedings and the government has reacted to threats that they will bring judicial review. For example, in 2008 the EHRC threatened judicial review when the Government proposed extending the time for pre-charge detention for terrorist suspects to 42 days.¹⁰⁰ Those proposals were dropped shortly thereafter. Strategic litigation is understood by both the EHRC and NIHRC as a core

⁹⁵ Ibid at [18].

⁹⁶ Ibid at [191].

⁹⁷ Ibid at [197].

⁹⁸ Ibid at [64].

⁹⁹ Ibid.

¹⁰⁰ EHRC, 'Our human rights legal powers' at <https://www.equalityhumanrights.com/en/our-human-rights-work/our-role-national-human-rights-institution-nhri/our-human-rights-legal-powers>.

component of their powers.¹⁰¹ The EHRC, the NIHRC and the Scottish Human Rights Commission work together in exercising influence on central government to comply with human rights.¹⁰² They are not unrelated to each other and this should have a bearing on how the NIHRC's standing is construed. Ultimately, the wording of their constitutive statute should be determinative but in the absence of clarity under the NIA, a purposive interpretation requires that the EHRC's unambiguous standing under the HRA is taken into account.

Lord Kerr's point of emphasis for establishing sufficient standing for the NIHRC under sections 3-5 procedure is the constitutional status of the NIA which provides for the NIHRC's standing. Lord Kerr cites Lord Bingham in *Robinson v Secretary of State for Northern Ireland* [2002] NI 390 in this regard:

The 1998 [Human Rights] Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution... the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody.¹⁰³

The NIHRC's standing is consistent with the purpose of the HRA: ensuring human rights compatibility and the principle of subsidiarity. Subsidiarity requires 'that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself'.¹⁰⁴ Rules on standing should facilitate convergence of human rights standards of the ECtHR, the UK, and its federal components.

Negative Ramifications of Lord Mance's Requirement for the NIHRC to identify and represent a 'victim'

A. Challenging Abortion Law in Northern Ireland

It is difficult to predict the circumstances under which Lord Mance would have granted admissibility in the present case. The NIHRC had identified specific women, including those

¹⁰¹ EHRC, 'Strategic Litigation' at <https://www.equalityhumanrights.com/en/legal-responses/strategic-litigation>.

¹⁰² See e.g. 'UK's reputation as human rights champion under threat' at <https://www.equalityhumanrights.com/en/our-work/news/uks-reputation-human-rights-champion-under-threat>.

¹⁰³ *Re NIHRC* (2018) n 2 above at [211] citing *Robinson v Secretary of State for Northern Ireland* [2002] NI 390 at [11].

¹⁰⁴ P.G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38.

that revealed their identity, who had been specific victims of the lack of availability of terminations in cases of FFA under the OAPA and CJA.¹⁰⁵ Further, affidavits were submitted by Marie Stopes International Northern Ireland and the Abortion Support Network who had worked with child rape victims seeking medical terminations.¹⁰⁶ However, according to Lord Mance, the NIHRC had not successfully identified a specific victim to meet standing under the NIA. What woman would meet Lord Mance's criteria to establish victim status and why would it be desirable for the NIHRC to bring these cases in its own name rather than make a victim of Northern Irish abortion law initiate proceedings, with the NIHRC merely providing legal representation? Lord Kerr assumes that, in order to constitute a person who is or would be 'directly affected' by an unlawful act by a public authority, the woman would have to be pregnant with FFA or as a result of rape or incest, and anticipate/or have been subject to the unlawful act: either the denial of abortion and going through with the pregnancy, or a criminal conviction. Lord Kerr¹⁰⁷ states that:

Women suffering from the ill-effect of a pregnancy where there is a [FFA] or who are pregnant because of rape or incest do not have the luxury of time with which to seek vindication of their rights.¹⁰⁸

A requirement that there must be a specific unlawful act affecting a particular individual before breach of article 3 and 8 can be canvassed throws into substantial question whether an effective remedy is possible for that section of the female population of Northern Ireland whose foetus has a fatal abnormality or who are pregnant as a result of rape or incest. [FFA] is frequently not detected until the 20 week scan. This provides an impossibly short time within which vindication of the woman's rights could be achieved.¹⁰⁹

¹⁰⁵ Sarah Ewart was the only victim who brought evidence without anonymity.

¹⁰⁶ See e.g. *Re NIHRC* (2017) n 31 above at [14-32].

¹⁰⁷ Lord Kerr's opinion seems to be influenced by Judge Horner in High Court who provides reasons for why women victims will not come forward: *Re NIHRC* (2015) n 26 above at [88-89]: the 'timescale will be such that for any women the decision of any court will almost certainly be academic...[F]or this Court to demand that unless women pregnant in the circumstances under consideration give evidence, the impugned provisions cannot be examined, would be to do a further injustice to them'.

¹⁰⁸ *Ibid* at [197].

¹⁰⁹ *Ibid* at [198].

The test envisaged by Lord Mance, although restrictive, is not as limited as Lord Kerr suggests. Women can access abortion until term in England. Section 1(1)(a) Abortion Act 1967 provides exceptions in having a 24 week limit whereas (b)-(d) have no time limit. The pregnant woman anticipating the ‘unlawful act’ or a woman unlawfully convicted appear to be eligible victims. The UK Supreme Court decision on the merits establishes that forcing a woman to undergo a termination of pregnancy in England in instances of FFA and sexual misconduct, or else face criminal prosecution at home, is a breach of Article 8. Therefore, making a woman travel could be construed as an ‘unlawful act’ under Article 8 following this decision. But Lord Mance’s test remains unclear and this is mere speculation.

To be consistent, Lord Mance would have to construe any woman of child bearing age bringing an action against the legislation as an *actio popularis* as this is a more loosely defined group of individuals than the NIHRC whose main function is to scrutinise legislation for compatibility with human rights. This is contrary to *Open Door and Dublin Well Woman v Ireland*, where the ECtHR established that those ‘directly affected’ could be anyone potentially affected by that legislation.¹¹⁰ In relation to distribution of information on abortion services in England, those ‘directly affected’ included all women of child bearing age who could potentially be denied this information. It would be inconsistent to deny the NIHRC standing when its function is to review and advise on legislation for its human rights compatibility under the Belfast Agreement and NIA, and yet to allow any woman of child-bearing age to be granted such standing. Lord Mance’s interpretation of the HRA gives rise to an absurdity which misrepresents the jurisprudence of the ECtHR and standing in public law.

This leads to the second question of why it would be desirable for the NIHRC to bring these cases in its own name rather than make a victim of Northern Irish abortion law initiate proceedings, with the NIHRC merely providing legal representation. Again, Lord Mance is not clear about who ~~he understands to be constitutes~~ a victim ~~in these cases~~ and neglects ECHR jurisprudence. We can only assume Lord Mance’s victim is someone who sought an abortion in England because they could not seek an abortion in Northern Ireland in one of the difficult cases. The High Court of Justice in Northern Ireland in its decision, *In the Matter of an Application by Sarah Ewart for leave to apply for Judicial Review*, appears to confirm that as a result of Lord Mance’s ruling, a victim who has an FFA can only seek to challenge the legality of legislation on that ground, and not in relation to criminalisation of abortion in other

¹¹⁰ *Open Door and Dublin Well Woman v Ireland* (1992) 15 EHRR 244 at [44].

circumstances.¹¹¹ Following the inadmissibility of the NIHRC to challenge Northern Irish abortion law, the High Court of Justice in Northern Ireland granted Sarah Ewart leave to apply for judicial review. She alleges a breach of her Article 8 right to private life as a result of a lack of access to abortion services in Northern Ireland when she suffered a fatal foetal abnormality. The grant of leave to judicial review judgment appears to confirm that the victim can only ~~A victim who had sought an abortion in England as a result of rape could not seek to challenge the law regarding prohibition of abortion in circumstances of FFA. Likewise, a victim who had an FFA could not seek to challenge the legal regime in cases of rape. They could only~~ challenge the law in relation to the unlawful act committed against them personally. This leaves open the question as to who would qualify as a victim to challenge legislation in cases of unwanted pregnancies resulting from sexual crimes. There is no clear direction in this regard. ~~To qualify as a rape victim, there would have had to be criminal proceedings establishing that the victim had been raped. Therefore, the women who were identified in the affidavits and obtained abortion pills would not qualify as a victim according to Lord Mance's test. To qualify as a victim for the purposes of challenging the abortion regime, it would not be enough that the woman alleged that she was raped.~~

Les Allamby, Chief Commissioner of the NIHRC, explained why the case was brought by the NIHRC rather than one of the women denied an abortion: justified bringing the case in their own name saying that 'we acted in this way in order prevent any woman or girl from having to face the burden of doing so'.¹¹² It would involve putting women on trial directly, requiring them to relive the distress in front of an audience, despite the fact that these women were not seeking individualised compensation or prosecutions: they wanted to change the legal regime so no other woman has to go through the same ordeal. Lord Mance's ambiguous proposals for bringing proceedings of this nature — from which the criteria for establishing whether one qualifies as a 'victim' must be deducted by guesswork — isare completely inappropriate. It is for these reasons that Lord Kerr states that 'a finding against the NIHRC signifies a significant curtailment of the practical application and effectiveness of articles 3 and 8'.¹¹³

¹¹¹ *In the Matter of an Application by Sarah Ewart for leave to apply for Judicial Review* [2018] NIQB 85 at [2].

¹¹² M. Bulman, 'Northern Ireland's abortion law violates human rights but challenge rejected on technical grounds, Supreme Court rules' (MSN, 7th June 2018) at <https://www.msn.com/en-gb/news/uknews/northern-irelands-abortion-law-violates-human-rights-but-challenge-rejected-on-technical-grounds-supreme-court-rules/ar-AAykI88>.

¹¹³ *Re NIHRC* (2018) n 2 above at [197].

B. Compromising Human Rights in Consociational Constitutional Setting

The NIHRC forms an integral part of the constitutional settlement agreed upon in the Belfast Agreement 1998 establishing a consociational government. Its duties and functions are set out in Strand 3 under a section entitled ‘Rights, Safeguards and Equality of Opportunity’. A consociational power-sharing arrangement is often adopted in post-conflict contexts. It is a model devised to facilitate cooperation between different ethno-national groups who share a territory and who have experienced conflict. A consociational arrangement includes a ‘grand coalition government’ and ‘segmental autonomy for groups’. ‘Grand coalition government’ ensures ‘institutionalised power-sharing between the political representatives of ethnic blocks’.¹¹⁴ In Northern Ireland this means equal representation of the British Unionist (predominantly Protestant) and Irish Nationalist (Catholic) communities. Segmental autonomy means that each ethno-national group retains control over certain issue. For example, all education in Northern Ireland is segregated along ethno-national lines, with separate curriculums, and separate HE institutions to provide qualifications in each curriculum. Other features of the consociational arrangement are proportionality of representation of major ethno-national groups in sectors carrying public functions (e.g. police, civil service, and education); and a minority veto.¹¹⁵

While this arrangement ensures that formerly underrepresented voices from different ethno-national communities are heard, a consociational government ‘inhibits effective political representation for groups that do not align with the societal divisions’.¹¹⁶ The assumption behind the consociational arrangement is that voters will choose to elect candidates for parties along those ethno-national lines.¹¹⁷ This model entrenches ethno-national divisions and fails to represent smaller ethno-national communities. It also means non-ethno-specific groups, in particular gender, are not sufficiently represented in the executive or legislature.¹¹⁸ Prior to the present litigation, both British Unionist and Irish Nationalist representatives agreed on the conservative position taken on abortion. Power-sharing arrangements often ‘sacrifice women’s

¹¹⁴ R. Kennedy, C. Pierson and J. Thomson, ‘Challenging identity hierarchies: Gender and consociational power-sharing’ (2016) 18(3) *British Journal of Politics and International Relations* 618, 622.

¹¹⁵ A. Lijphart, *Democracy in Plural Societies* (Yale University 1977).

¹¹⁶ n 105 above 618.

¹¹⁷ *Ibid* at 623.

¹¹⁸ *Ibid* at 625.

claims for equality in the interests of communal unity'.¹¹⁹ Since the ROI referendum and the UK Supreme Court decision on abortion, Northern Irish political positions on abortion are divided on the questions of whether to support liberalisation of the law, motivations for that support, and methods by which liberalisation should take place. Capture of issues relating to gender along ethno-national lines, compounded by the consociational mechanism of the petition of concern (POC), gives rise to stalemate in the Northern Irish Assembly in relation to reform of abortion.

Usually a majority of designated Unionist and Nationalist parties present and voting will suffice to pass a Bill. However, the minority veto, or POC, in Northern Ireland, is a key characteristic of the consociational arrangement and can increase the number of votes required to pass legislation for key decisions that may have an adverse impact on human rights and equality.¹²⁰ For the petition of concern, each Member of the Legislative Assembly (MLA) is designated nationalist, unionist or other for the purposes of measuring cross-community support in Assembly votes.¹²¹ 108 MLAs are elected, and a POC can be tabled by 30 MLAs to trigger a voting mechanism which requires either 'parallel consent - a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting'; or a 'weighted majority' (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting. Key decisions requiring cross-community support are usually designated in advance.¹²² How the POC has been used much more frequently as a handmaiden of partisanship.¹²³ The POC was used 115 times¹²⁴ in the 2011-2016 session to block 31 bills including on marriage equality, welfare reform legislation, and abortion laws. Prior to the 2017 election, the DUP had 30 MLAs in the assembly, enabling it to unilaterally issue a POC. Post the 2017 election, the DUP has 28 MLAs and cannot unilaterally trigger the POC. However, the DUP only requires the support from the

¹¹⁹ B. Hayes and I. McAllister, 'Gender and consociational power-sharing in Northern Ireland' (2013) 34(2) *International Political Science Review* 123.

¹²⁰ Belfast Agreement 1998, Strand One, para 5; Northern Ireland Act 1998, s 42.

¹²¹ Belfast Agreement 1998, Strand One, para 6.

¹²² Belfast Agreement 1998, Strand One, para 5; Northern Ireland Act 1998, s 42.

¹²³ Committee on the Administration of Justice, 'Implementing the 'Petition of Concern' (S469) CAJ Briefing Note, January 2018; summary'.

¹²⁴ S. Alexander, 'Petition of concern is a "safeguard for unionism"' (Belfast Telegraph, 9th March 2017) at <https://www.belfasttelegraph.co.uk/news/northern-ireland/petition-of-concern-is-a-safeguard-for-unionism-35514669.html..>

Traditional Unionist Voice which is anti-abortion to trigger the POC. This could effectively block legislative reform on abortion laws by requiring this higher threshold of votes. The DUP has signed 86 petitions of concern and is against liberalization of abortion in Northern Ireland. It has expressly stated that it will use a POC to block future reform of abortion.¹²⁵

In 2015, the main Irish Nationalist party, Sinn Féin, publicly announced its support for liberalisation of abortion in cases of rape, incest and FFA.¹²⁶ A private members bill was brought forward by former justice secretary and leader of the Alliance Party (the biggest party not characterised by ethno-national identity) David Ford, proposing to allow abortion in cases of FFA: the Abortion (Fatal Foetal Abnormality) Bill in 2016.¹²⁷ 59 voted against the introduction of the exception and 40 in favour. The Alliance party and UUP allowed a vote of conscience while the DUP and SDLP voted against it. Sinn Féin and the DUP are at the forefront of the division on gender rights in Northern Ireland as the two main political parties of the executive in Northern Ireland. While Sinn Féin is in favour of liberalising abortion, it does not want the Abortion Act 1967 to extend to Northern Ireland,¹²⁸ favouring alignment with post-referendum ROI legislation. Those who support abortion within the UUP support extension of the Abortion Act 1967 to Northern Ireland and claim that abortion law should be aligned throughout the UK.

In this context, the NIHRRC has served an exceptional democratic function in Northern Ireland. The strategic litigation of the NIHRRC has been crucial since 2015 in mobilizing both devolved and central politics around abortion rights. It plays a central role in circumventing the consociational mechanisms that prevent the effective implementation and preservation of human rights protection by urging the Department of Justice to ensure human rights compliance

¹²⁵ G. Cross, 'DUP will use veto to block abortion rights in Northern Ireland says Jim Wells' (Belfast Telegraph, 28th May 2018) at <https://www.belfasttelegraph.co.uk/news/northern-ireland/dup-will-use-veto-to-block-abortion-rights-in-northern-ireland-says-jim-wells-36953043.html>.

¹²⁶ T. Stanley, 'Is Sinn Féin Catholic? Its embrace of abortion says "no"' (Telegraph, 17th January 2015) at <https://www.telegraph.co.uk/news/uknews/northernireland/11352473/Is-Sinn-Fein-Catholic-Its-embrace-of-abortion-says-no.html>.

¹²⁷ Abortion (Fatal Foetal Abnormality) Bill as introduced in the Northern Ireland Assembly on 6 December 2016, Bill 03/16-21 at <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/non-executive-bills/session-2016-2017/abortion-ffa/abortion-ffa-efm-as-introduced---6.12.16.pdf>.

¹²⁸ G. Moriarty, 'Northern Assembly rejects abortion law changes' at <https://www.irishtimes.com/news/ireland/irish-news/northern-assembly-rejects-abortion-law-changes-1.2529989>.

and, more recently, by challenging the legality of abortion law in the courts. By bringing public litigation, the NIHRC transcends abortion rights above consociational politics. Stripping the NIHRC of standing puts into jeopardy challenges to legislation on behalf of all underrepresented groups of the community, whether they are ineffectively supported along ethno-national lines (women, the LGBT community¹²⁹) or not represented at all in Northern Irish consociational politics (refugees, children¹³⁰). Litigation as a measure of last resort for the NIHRC to ensure legislative and policy compliance with human rights will no longer exist.

This measure of last resort is crucial in the devolved setting. It brands abortion as a human rights issue, and thereby triggers the responsibility of central government. One may argue that litigation and a declaration of incompatibility will not change the current law and has no practical significance. This is because abortion is a devolved issue, to be debated and legislated by Stormont, and central government cannot and should not interfere. The Abortion Act 1967 does not apply to Northern Ireland¹³¹ and abortion was recently expressly devolved to Scotland.¹³² The model of devolution of Northern Ireland is unique and includes excepted, reserved, and transferred matters.¹³³ Transferred matters are those over which the Northern Ireland Assembly has full legislative powers and include health and social services, justice and policing. The UK believes that it cannot interfere with abortion laws in Northern Ireland because it is transferred as a criminal and health issue.¹³⁴

However, excepted matters include those that will never be devolved to Northern Ireland, including international relations, and ensuring that the UK is not in breach of its international treaty obligations.¹³⁵ Ensuring compliance with international obligations, including

¹²⁹ See e.g. Northern Ireland Human Rights Commission, 'Response to the Legislative Consent Motion in respect of the Marriage (Same Sex Couples) Bill' (June 2013) at <http://www.niassembly.gov.uk/globalassets/documents/finance-2011-2016/marriage-same-sex-couples-bill/written-submissions/nihrc-response.pdf>.

¹³⁰ See e.g. L. Allamby, 'Playing our Part to Help Refugees' (Belfast Telegraph, 22nd September 2015) at <https://www.belfasttelegraph.co.uk/opinion/news-analysis/playing-our-part-to-help-refugees-31546079.html>.

¹³¹ Abortion Act 1967, s 7(3).

¹³² Scotland Act 2016, s 53.

¹³³ Northern Ireland Act 1998, s 4.

¹³⁴ n 33 above at [53].

¹³⁵ Lady Hale, 'Devolution and the Supreme Court – 20 years On' (Scottish Public Law Group, Edinburgh, 14th June 2018).

international human rights law and the ECHR, is ultimately central government's responsibility. Article 27 of the Vienna Convention on the Law of Treaties states that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.¹³⁶ Therefore, the devolved status of abortion law is not an excuse for its incompatibility with human rights.¹³⁷ The delegation of government powers 'does not negate the direct responsibility of the State party's national or federal Government to fulfil its obligations to all women within its jurisdiction'.¹³⁸

The Sewel Convention provides that Westminster Parliament is supreme but it will not legislate on devolved matters. There is support for the argument that ultimately Parliament can legislate on devolved matters without legislative consent motions, even when that legislation would strip devolved states of their existing human rights.¹³⁹ Human rights protection ultimately remains the competence of central government. Section 6(2)(c) NIA states that a provision is outside the legislative competence if it is incompatible with any of the Convention rights. This means that the UK central government must take reasonable measures to ensure that legislative reform does take place in Northern Ireland.

There are a number of reasonable measures central government could take in order to be in conformity with its domestic and international obligations. It could repeal section 7(3) of the Abortion Act 1967 and extend it to the entirety of the UK. One could do this through the new Domestic Violence and Abuse Bill. There could be British Irish Intergovernmental conference¹⁴⁰ an option supported by Sinn Féin, because of its focus on ensuring self-governance by Northern Irish MLAs in the absence of an operational Assembly instead of direct rule approach. A British Irish Intergovernmental conference took place for the first time since 2007 to discuss Brexit negotiations on 25th July 2018. This signals an appetite for taking reasonable measures to ensure effective governance in Northern Ireland despite the lack of an operational Assembly.

The UK Supreme Court, not Northern Irish courts, ultimately reviews subordinate legislation for its compatibility with ECHR rights (section 24(1)(a) NIA) and UK primary legislation still

¹³⁶ Vienna Convention on the Law of Treaties 1969, article 27.

¹³⁷ n 33 above at [53].

¹³⁸ CEDAW Committee's General Recommendation (GR) No 28 (2010), CEDAW/C/OP.8/GBR/1 at [39].

¹³⁹ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [129-149].

¹⁴⁰ Belfast Agreement 1998, Strand Three.

in force in devolved states such as the OAPA. Litigation brings a lack of human rights compliance to the attention of central government and ensures responsibility is not shirked by dismissing it as a devolved issue. The NIHRC's power to bring litigation is crucial in ensuring that devolution is not used as a tool for smoke and mirrors.¹⁴¹ Once a declaration of incompatibility is made the ultimate responsibility for human rights compliance lies firmly in the hands of central government. The NIHRC litigation did raise the issue of the human rights incompatible Northern Irish abortion law to Westminster and has resulted in some recognition of the fact that they must take ultimate responsibility to make amends. Section 4 of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 requires that in the absence of Northern Irish Ministers and in light of the issues addressed by 'recent, current and future court proceedings in relation to the human rights of the people of Northern Ireland', the Secretary of State for Northern Ireland must specify to senior civil servants in Northern Ireland how to rectify the incompatibility of sections 58 and 59 OAPA 1861 with the HRA 1998.¹⁴² While this approach continues to treat reproductive rights as a devolved issue it requires central government to take measures to redress the incompatibility.

Conclusion

The unique constitutional circumstances of Northern Ireland, its post-conflict, consociational constitutional settlement, devolved status, transborder political party presence in the Republic of Ireland and the UK, need to be considered in clarifying the litigation powers of the NIHRC. It is not primarily the role of the NIHRC to act as legal representation for individual cases of unlawful acts, but to ensure legislation and policy is human rights compatible in a wholesale manner. It shields victims from the fortitudes of exposure generated by high profile litigation.

In order to rectify the effects of this judgment, the NIHRC should bring forward proposals to clarify its powers under sections 68-72 in order to ensure that its strategic litigation function complements its role in advising and reviewing law and policy. Section 69(5)(b) should be changed from 'bring proceedings' to 'initiate proceedings in its own name' to further clarify the distinction between assistance to victims in the form of legal representation under sections 69(5)(a) and 70. Section 71(2)(a)(ii) should omit section 69(5)(b). This would complement the

¹⁴¹ See e.g. J. Thompson, 'Now for Northern Ireland? UK politics, devolution and abortion rights' (12th June 2018, IPR Blog, University of Bath) at <http://blogs.bath.ac.uk/iprblog/2018/06/12/now-for-northern-ireland-uk-politics-devolution-and-abortion-rights/>.

¹⁴² Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, s 4(1)(a).

wording in section 30(1) in the Equalities Act 2006 which empowers the EHRC to challenge legislation.

While the President of the UK Supreme Court and sitting Northern Irish judge, Lord Kerr, acknowledged Northern Ireland's unique constitutional setting and reasoned accordingly, this knowledge was not demonstrated by the majority and is a matter of concern for future litigation involving human rights appeals from devolved courts.